

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12044
Non-Argument Calendar

D.C. Docket No. 2:19-cv-01030-WHA-CSC

BRENT WILLIAM JACOBY,

Plaintiff-Appellant,

versus

OFFICER YOUNG,
JEFFERSON S. DUNN,
Commissioner,
WARDEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(March 3, 2021)

Before LAGOA, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Brent Jacoby, an Alabama prisoner currently incarcerated at Elmore Correctional Facility, appeals the dismissal of his lawsuit under 42 U.S.C. § 1983 for failure to pay the filing fee. The district court denied Jacoby’s request to proceed *in forma pauperis*—i.e., without having to pay the filing fee immediately and in full—based on the “three strikes” rule imposed by 28 U.S.C. § 1915(g). The district court found that Jacoby previously had filed three or more lawsuits that were dismissed as frivolous, and it also concluded that Jacoby failed to show that he was in “imminent danger of serious physical injury.” On appeal, Jacoby contends that he did demonstrate imminent danger, and therefore the district court should have allowed him to proceed *in forma pauperis*.

We begin by noting that another of Jacoby’s appeals, significantly intertwined with this one, is also pending in this Court. *See Jacoby v. Lanier*, No. 20-11489 (11th Cir.). That case involves allegations of excessive force by multiple prison officials at Elmore Correctional Facility. The case before this panel, meanwhile, is concerned with the alleged use of excessive force by another officer at Kilby Correctional Facility, where Jacoby was transferred temporarily for roughly two weeks following the incidents at Elmore.

Ordinarily, a person who wishes to file a lawsuit in federal court must pay a filing fee of \$350 dollars before the case may move forward. 28 U.S.C. § 1914(a). If a prisoner is unable to pay the full fee up front, however, the district court

usually may allow that prisoner to pay in installments within his or her means, otherwise known as proceeding *in forma pauperis*. *Id.* § 1915(a)-(b).

A prisoner's right to proceed *in forma pauperis* is limited by the “three strikes” rule, which provides:

In no event shall a prisoner bring a civil action [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id. § 1915(g) (emphasis added). On appeal, Jacoby does not appear to challenge the district court's determination that he, while incarcerated, has filed three or more actions in federal court that were dismissed as frivolous. Consequently, the sole issue before us is whether the district court correctly found that Jacoby failed to show “imminent danger of serious physical injury.”¹

¹ There was some initial doubt as to whether we had jurisdiction to hear this appeal at all. The district court did not receive Jacoby's notice of appeal until June 1, 2020—which was well outside the thirty-day deadline for filing an appeal of the district court's order entered on February 21, 2020. But the notice was dated March 16, 2020. And under the “prison mailbox” rule, a prisoner's notice of appeal will be deemed timely if it is “deposited in the institution's internal mail system on or before the last day for filing” and accompanied by “a declaration . . . setting out the date of deposit and stating that first-class postage is being prepaid.” Fed. R. App. P. 4(c)(1). Furthermore, if a prisoner fails to include the necessary declaration alongside his notice of appeal, we have discretion to forgive that mistake and “permit the later filing of a declaration .” *Id.*

We chose to exercise that discretion and allowed Jacoby to file a belated declaration, under penalty of perjury, that his notice of appeal was deposited in his prison's mail system on March 16, 2020. His declaration is now part of the record on appeal. Accordingly, we consider Jacoby's appeal to be timely filed.

We must evaluate whether “imminent danger” exists in this case based on Jacoby’s current circumstances. “[A] prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed *in forma pauperis*.” Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999).

In this appeal—which concerns Jacoby’s alleged abuse at the hands of a prison officer at Kilby Correctional Facility—we conclude that Jacoby has not shown imminent danger of serious physical injury. The record establishes that Jacoby has been returned to Elmore Correctional Facility, and there is no evidence suggesting that he will be transferred back to Kilby Correctional Facility again in the near future. In our view, this fact forecloses a conclusion that Jacoby is in imminent danger from the specific defendants in this case. *See O'Connor v. Suwannee Corr. Inst.*, 649 F. App'x 802, 805 (11th Cir. 2016) (“O’Connor’s assertion that the SCI staff had threatened to continue to abuse him is not an imminent threat, because at the time of his filing, O’Connor had been transferred to UCI and he only speculated, without alleged facts in support, that he would be transferred back to SCI.”). Thus, the district court correctly determined that the “three strikes” rule rendered Jacoby ineligible to proceed *in forma pauperis*.²

² In so deciding, we express no opinion on the proper resolution of Jacoby’s other appeal, which concerns his allegations of abuse at Elmore Correctional Facility by prison officials who may pose a more immediate threat to him.

AFFIRMED.